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02-27-2002
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #70

THE TRADEMARK TRIAL AND APPEAL BOARD
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

KEVIN T. MC CARNEY, dba POQUITO MAS	)	Opposition No. 107,026
	)	Opposition No. 107,748
Opposer,	)	I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Assistant Commissioner for Trademarks, 2900 Crystal Drive, BOX TTAB Arlington, VA 22202-3513, on 2-25-02
v.	)	Elaine Albrich
UNA MAS, INC.	)	2-25-02 Date of Signature
Applicant.	)	

REPLY TO APPLICANT'S MEMORANDUM IN OPPOSITION TO OPPOSER'S MOTION TO STRIKE APPLICANT'S RESPONSES TO OPPOSER'S REQUEST FOR ADMISSIONS OR IN THE ALTERNATIVE APPLICANT'S MOTION TO AMEND ADMISSIONS PURSUANT TO FRCP 36(b)

Opposer, Kevin T. McCarney dba Poquito Mas hereby replies to Applicant's, Una Mas, Inc., Memorandum in Opposition to Opposer's Motion to Strike Applicant's Responses to Opposer's Request for Admissions or in the Alternative Applicant's Motion to Amend Admissions Pursuant to FRCP 36(b).

Applicant's responses to Opposer's Request for Admissions were not timely filed and are therefore admitted. On March 27, 1998 the Trademark Trial and Appeal Board suspended these proceedings in view of the settlement negotiations between the Parties. However, after the suspension by the Board, Applicant, not Opposer, served Discovery Requests on Opposer that are dated April 10, 1998. In view of Applicant's Discovery Requests and the mutual agreement that these proceeding should be continued, Opposer served its Discovery Requests on Applicant on

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June 1, 1998. Both Applicant's and Opposer's Discovery Requests took place during the suspension period in an expression of the Parties mutual consent that these proceedings should be continued in a timely manor. Opposer respectfully submits that the mutual consent to continue these proceedings is clearly shown by Applicant's Discovery Requests which were followed by Opposer's Discovery Requests. It is unconscionable that Applicant considers Opposer's Discovery Requests improper in view of Applicant's own Discovery Requests which were served first during the same suspension period.

At no time did Opposer waive Applicant's requirement to respond to Opposer's Discovery Requests. In fact, Opposer's actions clearly show that it was following through with the mutually continued discovery of the Parties by timely serving its responses on Applicant on June 18, 1998. In fact, Opposer's responses were even served within the time period for Applicant to timely submit its response to Opposer. Furthermore, the fact that Opposer only referred to the Interrogatory Requests and Document Requests in its January 22, 2002 letter is not a waiver. Opposer's January 2002 letter is well after Opposer's Request for Admissions were admitted based on the Federal Rules and, therefore, no further response was needed.

Applicant's failure to respond to the Discovery Requests is not "excusable neglect." The Federal Circuit has confirmed that "excusable neglect" is defined as:

> "Failure to take the proper steps at the proper time, not in consequence of the parties owned carelessness, inattention, or willful disregard of the process of the Court, but in consequence of some unexpected or unavoidable hindrance of accidents, or reliance on the care and vigilance of his counsel or on promises made by the adverse party."

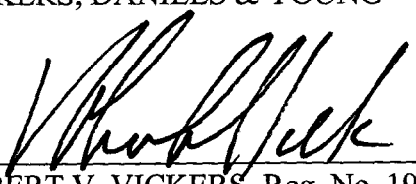
Hewlitt Packard Co. v. Olympus Corp., 18 USPQ2d 1710, 1712 (CAFC 1991), citing Blacks Law

Dictionary, 508 (5th ed. 1977). Further, the Federal Circuit goes on to state that reliance on silence is not excusable neglect. *Id.* at 1712. Even if reliance on silence were considered excusable neglect, which it is not, Opposer was not silent. In this respect, Opposer clearly conveyed it intentions by responding to Applicant's Discovery Requests. Accordingly, Applicant's failure to respond to Opposer's Request for Admissions is not "excusable neglect."

For all the above reasons, Opposer respectfully requests that the Board grant its Motion to Strike Applicant's Responses to Opposer's First Request for Admissions as untimely and already deemed admitted.

Respectfully submitted,

VICKERS, DANIELS & YOUNG



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY TO APPLICANT'S MEMORANDUM IN OPPOSITION TO OPPOSER'S MOTION TO STRIKE APPLICANT'S RESPONSES TO OPPOSER'S REQUEST FOR ADMISSIONS OR IN THE ALTERNATIVE APPLICANT'S MOTION TO AMEND ADMISSIONS PURSUANT TO FRCP 36(b) was served on Applicant, Una Mas, Inc., by first class mail, postage prepaid, this 25th day of February, 2002 to the attorney for Applicant at the address below:

David J. Brezner
Flehr, Hohbach, Test, Albritton & Herbert LLP
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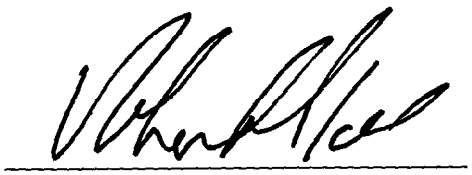
San Francisco, CA 94111-4187



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